

FILED

08 FEB 21 AM 11:50

UNITED STATES DISTRICT COURT

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

By: *[Signature]*

DEPUTY

'08 CV 0331 JLS WMC

ANTONIO MICHAEL VITALE,

Petitioner,

vs.

JAMES TILTON, Secretary, California
Department of Corrections and Rehabilitation,

Respondent.

Case No. _____

PETITION FOR WRIT OF HABEAS CORPUS

BY A PERSON IN STATE CUSTODY¹

(28 U.S.C. 2254)

BY: PATRICK MORGAN FORD
Law Office of Patrick Morgan Ford
1901 First Avenue, Suite 400
San Diego, CA 92101
(619) 236-0679
SBN 114398Attorney for Petitioner
ANTONIO MICHAEL VITALE

¹ The petition herein, prepared by counsel, complies with Habeas Corpus Rule 2(c) and follows the format of local form CIV 68 (Rev 11/98).

1. Name and location of court that entered the judgment of conviction under attack:

Superior Court of San Diego County, San Diego, California.

2. Date of judgement of conviction:

The sentence was imposed on April 25, 2006.

3. Trial court case number of the judgment of conviction being challenged:

SCD 186877.

4. Length of sentence:

42 years-to-life.

5. Sentence start date and projected release date:

Sentence commenced on April 25, 2005; Petitioner is serving an indeterminate life sentence.

6. Offenses for which [petitioner] was convicted or pleaded guilty to:

Three counts of rape (Penal Code section 261(a)(2));
Four counts of forcible oral copulation (Penal Code section 288(a)(2));
Multiple sexual assault victims (Penal Code section 667.61(a)(c)(e); and,
Possession of a controlled substance (Health and Safety Code section 11377(a)).

7. What was your plea?

(a) Not guilty ☒
(b) Guilty ☐
(c) Nolo contendere ☐

8. If [petitioner] pleaded not guilty, what kind of trial [was] had?

(a) Jury ☒
(b) Judge only ☐

9. Did [petitioner] testify at trial?

☐ Yes ☒ No

DIRECT APPEAL

10. Did [petitioner] appeal from the judgment of conviction in the California Court of Appeal?

☒ Yes ☐ No

11. If [petitioner] appealed in the California Court of Appeal answer the following:

(a) Result:

Judgment affirmed.

(b) Date of result, case number and citation, if known:

August 16, 2006; Case no. D046393; Unpublished opinion.

©) Grounds raised on direct appeal:

- I. There was insufficient evidence as to a lack of consent to sustain the convictions for forcible rape and forcible oral copulation as to either of the prostitute victims.
- II. The trial court denied petitioner due process of law and deprived him of a fair trial by refusing the defense request to give an instruction under *People v. Mayberry* regarding a defendant's mistaken, but good faith belief that the complainants consented to the sexual acts.
- III. The trial court denied petitioner a fair trial by admitting an irrelevant and highly inflammatory video tape of appellant engaging in consensual sexual conduct with a prostitute in Thailand.

12. If [petitioner] sought direct review of the decision on appeal by the California Supreme Court (e.g. a Petition for Review), please answer the following:

(a) Result:

Petition for review denied.

(b) Date of result, case number and citation, if known:

November 29, 2006; No. S146674; Unpublished decision.

(c) Grounds raised:

Same as above in 11(c).

13. If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to that petition:

Not applicable; No certiorari petition filed.

COLLATERAL REVIEW IN STATE COURT

14. Other than a direct appeal from the judgment of conviction and sentence, [has petitioner] previously filed any petitions, applications, motions, (e.g., a Petition for writ of Habeas Corpus) with respect to this judgment in the California Superior Court?

☐ Yes ☒ No

15. If the answer to #[14] was "Yes," give the following information:

Not applicable.

16. Other than a direct appeal from the judgment of conviction and sentence, [has petitioner] previously filed any petitions, applications, motions, (e.g., a Petition for writ of Habeas Corpus) with respect to this judgment in the California Court of Appeal?

☐ Yes ☒ No

17. If your answer to #[16] was "Yes," give the following information:

Not applicable.

18. Other than a direct appeal from the judgment of conviction and sentence, [has petitioner] previously filed any petitions, applications, motions, (e.g., a Petition for writ of Habeas Corpus) with respect to this judgment in the California Supreme Court?

_ Yes x No

19. If your answer to #[18] was "Yes," give the following information:

Not applicable.

20. If you did *not* file a petition, application or motion (e.g., a Petition for Review or a Petition for Writ of Habeas Corpus) with the California Supreme Court containing the grounds raised in this federal Petition, explain briefly why you did not:

Not applicable.

COLLATERAL REVIEW IN THE FEDERAL COURT

21. Is this your **first** federal petition for writ of habeas corpus challenging this conviction?

x Yes _ No

GROUND FOR RELIEF

22. I. There was insufficient evidence as to a lack of consent to sustain the convictions for forcible rape and forcible oral copulation as to either of the prostitute victims.

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Supporting Facts:²

The instant charges stem from petitioner's encounters with two different prostitutes working on El Cajon Boulevard in the Spring of 2003.

In the first incident, involving "V.S.," she accompanied petitioner in his car to petitioner's apartment after agreeing upon a price for specified sexual acts.

V.S. would later claim that she did not want to perform some of the acts she engaged in with petitioner, however she did not state to this to petitioner, nor try to stop him or otherwise resist. Before leaving the apartment she repeatedly demanded to be paid, and appellant replied he had already paid her.

Outside, she fled from petitioner's car, ran to a liquor store and got a ride back to the area where she worked as a prostitute. She did not report this incident to police until November of 2003, when she was being interviewed regarding an unrelated prostitution ring.

In May of 2003, M.S. was also working as a prostitute on El Cajon Boulevard. She too accompanied petitioner in his car to his apartment after agreeing upon a price of \$300 for some spanking and unspecified sexual acts.

Once inside the apartment, petitioner told her he was a vice cop, but she later testified that she never believed this. She engaged in several sex acts with petitioner, after he spanked her with a paddle.

Even though she cried at various times, she never indicated that she resisted, told petitioner to stop, or that she wanted to leave. She then stated that she at some point "may have" told petitioner that she no longer wanted to engage in sex, but she could not be sure. Petitioner never used or threatened her with physical force. She willingly removed her clothes. While they were having sex, appellant "treated her like she was his girlfriend."

² In that petitioner is challenging the sufficiency of the evidence, a more detailed statement of the facts appears in the accompanying Memorandum of Law in Support of Petition for Writ of Habeas Corpus by a Person in State Custody, which is incorporated here by reference.

After petitioner refused to pay her, she ran outside and approached some people in a van, telling them she had been raped. Against her instructions, and V.S.'s pimp telling them on the phone not to do so, one of the people called police who responded to the scene. V.S. gave them a false name and told them she had been walking in the Mission Valley area when a man lured her into his car, kidnapped her and raped her. Several months later she was located in Florida and appeared at trial.

- II. The trial court denied petitioner due process of law and deprived him of a fair trial by refusing the defense request to give an instruction under *People v. Mayberry* regarding a defendant's mistaken, but good faith belief that the complainants consented to the sexual acts.

Supporting facts:

Based upon the ambiguous and self-contradictory testimony of both prostitutes regarding their alleged withdrawal of consent, and petitioner's statements in a telephone interview with a detective that the prostitutes had both consented to all the sexual acts he performed, the defense requested that the court give the so-called *Mayberry* instruction found in CALJIC No. 10.65. (*People v. Mayberry* (1975) 19 Cal.3d 143.) This instruction holds that a jury must find a defendant not guilty if he entertained a mistaken, but good-faith belief the victim of a sexual assault consented to the acts. The court refused to give the instruction, mis-citing the testimony of the prostitutes by stating that each of them had indicated they became fearful and withdrew their consent to any further sex acts.

- III. The trial court denied petitioner a fair trial by admitting an irrelevant and highly inflammatory video tape of appellant engaged in consensual sexual conduct with a prostitute in Thailand.

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Supporting Facts:

Police searched petitioner's residence on February 10, 2004, and seized a video tape which depicted petitioner engaging in various sexual activities with a young Asian woman – perhaps in her early twenties. Appellant's passport reflected that he had traveled to Thailand from the middle of December, 2003, to the middle of January, 2004. Over defense objection, the tape (designated as People's Exhibit 20), and a Thai-to-English transcript were admitted under Evidence Code section 1108.

Petitioner contended that the tape was inadmissible under the cited statute and the Due Process clause of the Fourteenth Amendment.

Did you raise [this] ground in the California Supreme Court?

☒ Yes, at to each ground asserted. ☐ No

23. Do you have any petition or appeal now pending in any court, either state or federal, pertaining to the judgment under attack?

☐ Yes ☒ No

24. If you answer to #23 is "Yes," give the following information:

Not applicable.

25. Give the name and address, if known, of each attorney who represented In the following stages of the judgment attached herein:

(a) At the preliminary hearing:

Robert Grimes, Attorney at Law
2664 Fourth Avenue
San Diego, CA 92101

(b) At arraignment and plea:

Robert Grimes

//

(c) At trial:

Robert Grimes

(d) At sentencing:

Robert Grimes

(e) On appeal:

Patrick Morgan Ford
Law Office of Patrick Morgan Ford
1901 First Avenue, Suite 400
San Diego, CA 92101

(f) In any post-conviction proceeding:

This proceeding:

Patrick Morgan Ford

(g) On appeal from any adverse ruling in a post-conviction proceeding:

Not applicable.

26. Were you sentenced on more than one count of an indictment, or more than one indictment in the same court and at the same time?

☐ Yes ☒ No

27. Do you have any future sentence to serve after you complete the sentence Imposed by the judgment under attack?

☐ Yes ☒ No.

28. Date you are mailing (or handing to a correctional officer) this Petition to this court:

Not applicable.

WHEREFORE, Petitioner prays that the Court grant Petitioner relief to which he may be entitled in this proceeding.

PATRICK MORGAN FORD,
Attorney for Petitioner
ANTONIO MICHAEL VITALE

I declare, under penalty of perjury that the foregoing is true and correct.

Executed on December 27th 2007.

ANTONIO MICHAEL VITALE,
Petitioner

A handwritten signature in cursive script that reads "Antonio Michael Vitale".

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

ANTONIO MICHAEL VITALE

08 FEB 21 AM 11:50

DEFENDANTS

JAMES TILTON

(b) County of Residence of First Listed Plaintiff

(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

(c) Attorney's (Firm Name, Address, and Telephone Number)

PATRICK MORGAN FORD
1901 1ST AVE. STE 400
SAN DIEGO, CA 92101 (619) 236-0679

DEPUTY ATTORNEYS (If Known)

CALIFORNIA ATTORNEY GENERAL

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

28 U.S.C. 2257

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State ☒ 1 ☒ 1 Incorporated or Principal Place of Business in This State ☐ 4 ☐ 4
- Citizen of Another State ☐ 2 ☐ 2 Incorporated and Principal Place of Business in Another State ☐ 5 ☐ 5
- Citizen or Subject of a Foreign Country ☐ 3 ☐ 3 Foreign Nation ☐ 6 ☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence <input checked="" type="checkbox"/> Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 U.S.C. 2257

Brief description of cause:

PETITION FOR WRIT OF HABEAS CORPUS

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

2/16/08

SIGNATURE OF ATTORNEY OF RECORD

Patrick Morgan Ford

FOR OFFICE USE ONLY

RECEIPT #

147915

AMOUNT

\$5.00

APPLYING IFP

JUDGE

MAG. JUDGE

801 2/21/08

**UNITED STATES
DISTRICT COURT**
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

147919 - SH

**February 21, 2008
13:18:06**

Habeas Corpus

USAO #.: 08CV0331

Judge..: JANIS L. SANMARTINO

Amount.: \$5.00 CK

Check#.: PC1613

Total-> \$5.00

FROM: VITALE V. TILTON